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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DAVID HARMER et al., Plaintiffs, Cross-Defendants and Respondents, v. ANNIE REYNAUD et al., Defendant, Cross-Complaint and Appellant.	B163346 (Los Angeles County Super. Ct. No. LC050880)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard C. Adler, Judge. Affirmed in part; reversed in part.

Law Offices of Richard P. Towne, Richard P. Towne and Paul M. Hittelman for Defendant, Cross-Complainant and Appellant.

Awad & Awad and Akram A. Awad for Plaintiffs, Cross- Defendants and Respondents.

Annie Reynaud appeals from judgment entered after judicial arbitration awards against her were confirmed by the trial court. She contends the awards should not have been confirmed because: the arbitrator acted in excess of his authority in denying her request for a continuance for health reasons; the arbitrator was not authorized to strike her answer to the complaint or to dismiss her cross-complaint because of her nonappearance; plaintiffs, David and Amal Harmer, presented new theories and evidence at the arbitration, which constituted extrinsic fraud; the awards did not address all issues in dispute; and the awards are in violation of public policy to protect the disabled. Finally, she asserts that the trial court was without jurisdiction to amend the judgment nunc pro tunc after she filed her notice of appeal.

We find no basis for reversal of the judgment based on confirmation of the arbitration awards, but conclude the trial court was without authority to amend the judgment nunc pro tunc.

FACTUAL AND PROCEDURAL SUMMARY

The record on appeal is sparse. Each side submitted an appendix in lieu of a clerk's transcript. Neither contains the complaint by the Harmers or the cross-complaint by Reynaud. The record contains an arbitration brief presented by the Harmers, but no brief was submitted on behalf of Reynaud. In order to provide some background, we take a portion of this factual summary from the Harmers' arbitration brief.

The convoluted relationship between the Harmers and Annie Reynaud began in 1998 when Reynaud approached the Harmers' mortgage company (American Property Mortgage) to obtain a loan for the purchase of real property in Woodland Hills. Amal Harmer is a licensed real estate broker and mortgage loan broker. Reynaud obtained a first deed of trust from another source, Option One Mortgage Company, but needed additional funds to complete the purchase. She obtained a second trust deed from American Property Mortgage. The Harmers also gave Reynaud a no-interest personal loan of $2,500 with a note requiring repayment within six months. There was a dispute

between the parties as to whether this note was to be offset against the fees Reynaud charged for acting as contractor in a remodel of the Harmers' home.

In March 1999, the Harmers hired Reynaud to remodel their home. The terms of this agreement were disputed. The remodeling work did not go smoothly. According to the Harmers, Reynaud quit the project in July 1999 without completing the work. The Harmers also claimed there were significant deficiencies in the work performed by Reynaud's company. The Harmers hired a new contractor, who completed the work in December 1999. Reynaud had been paid $52,444.38 (of the original $65,440 contract price) and the new contractor was paid $99,397.20.

A spate of litigation ensued between the parties. The Harmers sued Reynaud in small claims court on the $2,500 personal loan. In August 1999, Reynaud filed a mechanics lien against the Harmers' property and proceeded to foreclose on the lien.[1] In December 1999, the Harmers sued Reynaud for breach of contract and fraud arising from the construction problems. In October 2000, Reynaud filled a cross-complaint against the Harmers regarding the loan arrangements between them.

On July 31, 2001, the parties agreed in writing to submit their disputes to judicial arbitration and waived the right to trial de novo. Arbitration was to be conducted by the Alternative Resolution Centers (ARC) and was scheduled for November 12, 2001 before Justice Richard Amerian (retired). Before his death in November 2001, Justice Amerian presided over discovery motions brought by the Harmers. Following a hearing on September 20, 2001, he sanctioned Reynaud $5,000 plus the costs of the hearing. On November 2, 2001, Justice Amerian issued additional discovery rulings and awarded sanctions against Reynaud of $2,600 plus two-thirds of the costs of his time in resolving these disputes.

Upon the arbitrator's death, the parties selected Judge Edward Kakita, retired, as the new arbitrator and scheduled the arbitration for January 23, 2002. On December 17,

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[1] The municipal court consolidated the small claims action by the Harmers with Reynaud's mechanics lien action.

2001, Richard Towne, counsel for Reynaud, informed counsel for the Harmers that he required a continuance of the arbitration because of a trailing trial. Over objection, Judge Kakita continued the arbitration to March 14, 2002. On January 30, 2002, Judge Kakita sanctioned Reynaud an additional $2,500 in a discovery dispute and imposed costs of $1,400.

On February 21, 2002, Mr. Towne informed counsel for the Harmers that he would not be available for arbitration on March 14, 2002. Over objection by the Harmers, Judge Kakita again continued the arbitration, to April 29, 2002.

On Wednesday, April 24, 2002, Mr. Towne wrote to Judge Kakita and to counsel for the Harmers informing them that Reynaud could not participate in the arbitration scheduled for April 29 because of a heart condition. He attached a letter from Reynaud's physician, Dr. Debra Judelson, which stated: "This letter is to certify that I saw Mrs. Annie Reynaud in my office today, April 23, 2002. I feel that she [is] suffering from stress induced exacerbations of her chronic back and chest conditions as well as a stress induced skin condition. I have requested that she refrain from stressful situations for two to three weeks to give these acute exacerbations and conditions an opportunity to resolve. I will see her for follow up at that time." Mr. Towne requested a postponement of the arbitration "for at least several weeks until after the followup appointment referenced in the letter." He suggested that the arbitrator or counsel for the Harmers call him if there were questions or if further information about Reynaud's medical condition was required.

On Friday, April 26, 2002, Mr. Towne faxed a letter to ARC and to counsel for the Harmers: "This facsimile will acknowledge your telephone message yesterday morning advising that, notwithstanding Ms Reynaud's documented and unchallenged current medical incapacity and inability to prepare for, attend or participate in the arbitration of the above matter currently set for hearing at ARC on April 29, 2002, she will be defaulted for her disability-caused nonappearance. This decision has been made with the knowledge that she is a party defendant and our key witness, and that her medical conditions, currently exacerbated as described in Dr. Judelson's April 23, 2002 letter, include pericarditis (heart disease), which causes debilitating pain equivalent to a heart

attack, and paroxysal [*sic*] supreventricular [*sic*] tachycardia. For your information, she is currently taking the following prescription medications: morphine, prednisone, vioxx and toradol. [¶] I will be forwarding a formal response later in the day following further discussions with her cardiologist and the review of documents received from the Harmers' counsel late last night. In the meantime, to correct a misstatement in your message, the only reason this matter was not arbitrated on November 12, 2001 was the untimely and unfortunate death of Justice Amerian, rather than any fault of Ms. Reynaud's."

Reynaud's appendix includes two other documents relating to continuance of the arbitration: an objection to the arbitration with a declaration by her attorney, and a declaration by Reynaud's physician. In their brief on appeal, the Harmers object to the inclusion of these and other documents in the appendix on the ground that they were not part of the record in the superior court. Reynaud does not respond to this argument in her reply brief, but the record establishes that the documents were filed with the trial court on April 30, 2002 as part of "Notice of Filing Documents and Objections re Pending Judicial Arbitration Proceedings." Reynaud's counsel, Mr. Towne, submitted a declaration in support of that filing stating that both the objections and Dr. Judelson's declaration were transmitted to ARC and opposing counsel. Based on this declaration, we will consider the documents to be part of the record on appeal.

In support of his declaration, Mr. Towne attached a copy of a letter he sent by facsimile to ARC and to counsel for the Harmers on April 29, 2002: "I am currently waiting for the return of a further declaration from Ms. Reynaud's cardiologist Dr. Judelson regarding her disability and updated medical condition, and will forward it to you immediately upon receipt. In the meantime, in the event that the matter proceeds under the current circumstances of her involuntary absence, in light of our prior notices of unavailability and objections, Ms. Reynaud expressly reserves all available rights and remedies under applicable state and federal law." Mr. Towne declared: "I had been previously advised in a telephone conversation from [the director of] ARC, that I could participate in the commencement of any proceedings on April 29, 2002 by telephone.

However, despite my request, I did not receive any telephone or written notice of what, if anything, transpired at ARC on April 29, 2002."

The April 30, 2002 filing with the superior court included a second letter dated April 29, 2002 by Mr. Towne which was faxed to ARC and counsel for the Harmers. It attached a declaration by Dr. Judelson regarding Reynaud's medical condition, stating that Dr. Judelson had not been able to return the declaration to Mr. Towne until after her morning schedule on April 29, 2002. In the letter, Mr. Towne stated: "In the meantime, since we do not know what has transpired in this matter today, Ms. Reynaud continues to expressly reserve all available rights and remedies under applicable state and federal law." Mr. Towne characterizes this letter in his April 30th declaration as follows: "I reiterated . . . that I had requested telephonic notice of any ongoing proceedings but had not received any such notice. As of this writing I do not know and have not been told what, if anything, occurred yesterday." The declaration by Dr. Judelson stated that in her opinion, Reynaud was currently medically disabled and unable to participate in the arbitration or any other high stress activity. She recommended that Reynaud be confined to bed rest and, if her condition did not abate, that she be hospitalized.

The arbitration was held on April 29, 2002. When neither Reynaud nor her attorney appeared, the arbitrator struck Reynaud's answer and dismissed her cross-complaint with prejudice for "nonappearance." The arbitration proceeded as a prove up by the Harmers on their causes of action for breach of contract, fraud in the inducement, and continuing fraud. The arbitration lasted five hours, with testimony from both the Harmers and one other witness. A videotape, photographs, and over 100 exhibits also were submitted. The arbitrator took the matter under submission.

On May 15, 2002 the arbitrator issued an award in favor of the Harmers. He found a valid construction contract between the Harmers and Reynaud and evidence of numerous material breaches of contract by Reynaud. He awarded contract damages of $90,000. The arbitrator also found that Reynaud committed fraud in order to induce the Harmers to enter into the construction contract and found damages of $90,000 based on that fraud. Based on a finding that Reynaud continued to commit fraud during the

construction process, the arbitrator found further damages in the amount of $90,000, for a total damages award of $270,000. Based on an attorney's fee clause in the construction contract, the Harmers were awarded fees and costs of $77,122.63.

Counsel for the Harmers attempted to file the arbitration award with the superior court on May 16, 2002. The pleading stated that in accordance with the California Rules of Court, the judgment was submitted to the trial court for confirmation and entry. This submission was stamped "received" on that date.

The next step taken by Reynaud is somewhat unclear based on the record on appeal. She submitted a "Supplemental Declaration of Richard P. Towne re Pending Judicial Arbitration Proceedings; Request for Continuance of Hearing on Previously Filed Motion to Confirm Prearbitration Awards." The file date on this document is illegible. The motion to confirm to which this document refers is not in either appendix on appeal. From the apparent title and the timing we infer that it concerned the awards made by the two arbitrators on discovery motions. Reynaud's pleading was accompanied by a May 2, 2002 declaration by Mr. Towne. He said that he had not received any notice by telephone or in writing as to what occurred at the arbitration on April 29 and therefore was unable to respond to the motion to confirm.

On May 16, Mr. Towne executed a supplemental declaration in which he reiterated the failure of ARC to communicate with him about the events of April 29, 2002. He also stated that counsel for the Harmers had not served him with any documents or pleadings. Mr. Towne repeated his client's objections to any award of the arbitrator and stated he was unable to prepare for the hearing on the motion to confirm. On May 22, 2002, Reynaud filed a "response" to the May 15, 2002 arbitration award. She advised that she planned to move to vacate the award.

On June 5, 2002 the Harmers filed a motion to confirm the arbitrator's awards of September 20, 2001, November 2, 2001, January 25, 2002, and the final award of damages, fees and costs following the April 29, 2002 arbitration. The Harmers also sought $4,840 in fees and costs in connection with the motion.

Reynaud filed a motion to vacate the award on June 11, 2002. She argued that the award was the result of misconduct and prejudice by the arbitrator because the arbitration was conducted in effect as a default prove up in her absence. The declaration of Mr. Towne in support of this motion merely authenticated the attached documents -- the ethical standards for neutral arbitrators, the judicial arbitration agreement, and the arbitration award.

Reynaud also filed a consolidated memorandum of points and authorities in opposition to the motion to confirm and in reply to the Harmers' opposition to the motion to vacate. Mr. Towne's declaration in support of this pleading did not explain why he did not appear at the arbitration on April 29, 2002, nor did it state that he had attempted to participate by telephone.

On July 2, 2002, the trial court issued its order. It confirmed the two awards of sanctions and costs against Reynaud by Justice Amerian, on September 20 and November 2, 2001. It confirmed the sanctions and costs award against Reynaud by Judge Kakita on January 25, 2002. It also confirmed the arbitrator's May 15, 2002 award of $270,000 in damages and fees and costs of $77,122.63. Reynaud was ordered to pay the Harmers $4,840 in fees and $29 in costs incurred in bringing the motion to confirm the award.

Judgment on the arbitration awards was entered November 13, 2002 for a total of $364,691.63 against Reynaud in favor of the Harmers. In December 2002, the Harmers sought correction of the record nunc pro tunc. They argued that judgment actually was entered on the arbitration award by operation of law on June 16, 2002, but was not properly lodged by the clerk and was not effective until November 13, 2002. Reynaud objected to this request. The trial court concluded that the granting of the motion to confirm the arbitration award was equivalent to a judgment and corrected the July 2, 2002 order to read "Order and Judgment." Reynaud filed her appeal from the judgment on November 15, 2002.[2]

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[2] The judgment is not appealable. "There is no right to appeal from a judgment entered on a judicial arbitration award. (Code Civ. Proc., § 1141.23; Cal. Rules of Court,

DISCUSSION

I

Reynaud's major attack on the judgment is based on the denial of her request for a further continuance of the arbitration because of health problems.

"Appellate courts have long recognized a distinction between true arbitration and judicial arbitration. [Citations.] Judicial arbitration is basically a creature of statute (Judicial Arbitration Act, Code Civ. Proc., § 1141.10 et seq.), . . ." (*Parker v. Babcock* (1995) 37 Cal.App.4th 1682, 1686.) "'Unlike [true] arbitration, judicial arbitration takes place within the judicial arena and is *necessarily* followed by court action, consisting of either a trial de novo (Code Civ. Proc., § 1141.20) or entry of judgment on the award (Code Civ. Proc., § 1141.23). . . .'" (*Id.* at p. 1687.)

Code of Civil Procedure section 1141.14 directs the Judicial Council to enact rules for practice and procedure in judicial arbitrations. California Rules of Court, rules 1601-1618 were adopted pursuant to that directive. These court rules were reorganized, renumbered, and amended, effective January 1, 2004. (23 pt. 2 West's Ann. Codes, Rules (2004 supp.) foll. rules 1600-1618, pp. 381-398.) We apply the rules in effect in 2002 when the events at issue took place. Code of Civil Procedure section 1141.22 provides that Judicial Council rules shall specify the grounds upon which an arbitrator or the court may vacate a judicial arbitration award. The 2002 version of California Rules of Court, rule 1615 (hereafter rule 1615), subdivision (d), allowed a party to move to vacate a judgment on an award made in a *judicial* arbitration on the ground the arbitrator

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rule 1615(c).) However, an appeal does lie from certain postjudgment orders, including . . . an order denying a motion to vacate or set aside the judgment. (*Mentzer v. Hardoin* (1994) 28 Cal.App.4th 1365, 1368 [34 Cal.Rptr.2d 214] [request for trial de novo]; *Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 609-610 [241 Cal.Rptr. 731] [motion to set aside judgment].)" (*Karamzai v. Digitcom* (1996) 51 Cal.App.4th 547, 549-550, fn. omitted.) In the interest of resolving the matter on the merits, we deem the notice of appeal to be from the order denying the motion to vacate the award.

was subject to disqualification not disclosed before the hearing or "upon one of the grounds set forth in section 473 . . . subdivisions (a), (b), and (c) of section 1286.2 of the Code of Civil Procedure, *and upon no other grounds*." (Italics added.)

By 2002, when the events relevant here took place, Code of Civil Procedure section 1286.2 (hereafter section 1286.2) had been reorganized, but rule 1615 had not been amended to make the corresponding changes. As of 2001, subdivisions (a), (b), and (c) (referenced in rule 1615(d)) of former section 1286.2 provided that the court "shall vacate" an arbitration award if it determined any of the following: "(a) The award was procured by corruption, fraud or other undue means. [¶] (b) There was corruption in any of the arbitrators. [¶] (c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator." Subdivision (e) of former section 1286.2, which was not made a basis to vacate a judicial arbitration award by incorporation in rule 1615, addressed denial of a continuance where "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title." Read together, section 1286.2 and rule 1615 provided that a judicial arbitration award could not be vacated for failure to postpone an arbitration hearing.[3]

Although the rules did not allow Reynaud to challenge the judgment because her continuance was denied, the Harmers do not make this argument. Instead, they address

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[3] Just months before the arbitration here, effective January 1, 2002, Code of Civil Procedure section 1286.2 was reorganized. (Stats. 2001, ch. 362 (S.B. 475.) The Historical and Statutory Notes following section 1286.2 describe the effect of the 2001 amendment: "Stats. 2001, c. 362 (S.B. 475), designated the existing introductory paragraph as new subd. (a), and redesignated as subparagraphs (1) to (6), former subdivisions (a) to (f); . . ." (Historical and Statutory Notes, 19A West's Ann. Code Civ. Proc. (2004 supp.) foll. § 1286.2, p. 120.) The corresponding changes to California Rules of Court, rule 1615 were not made until 2003. (Historical Notes, 23 pt. 2 West's Ann. Court Rules (2004 supp.) foll. rule 1615, p. 396 ["The January 1, 2003 amendment, in subd. (d) substituted '(1), (2), and (3)' for ', (b), and (c)' in the subdivision reference to Code of Civil Procedure § 1286.2"].)

the merits of the argument that the continuance should have been granted. Therefore, we need not decide whether Reynaud may raise the denial of the continuance as a basis to vacate the award. As we explain, the record demonstrates no abuse of discretion in denying the continuance, and the trial court therefore properly denied the motion to vacate the arbitration award.

It appears that the parties failed to comply with the applicable rules of court governing the timing of judicial arbitrations. Former California Rules of Court, rule 1605(b) provided that the arbitration hearing must be completed within 90 days of the date of assignment of the case to the arbitrator, including any time due to continuances. That time frame could be extended only by *court* order: "An arbitration hearing shall not be continued to a date later than 90 days after the assignment of the case to the arbitrator, including any time due to continuances granted under this rule, except by order of the court upon the motion of a party as provided in subdivision (b)." (Former Cal. Rules of Court, rule 1607(c).)[4] Former California Rules of Court, rule 1607(b) provided a procedure for a party to request a continuance from the trial court if the arbitrator refuses to grant a continuance: "If the arbitrator declines to give consent to a continuance, upon the motion of a party and for good cause shown under the standards recommended in section 9 of the Standards of Judicial Administration, the court may grant a continuance of the arbitration hearing. . . ."

We sent a letter to counsel asking when Judge Kakita was assigned as arbitrator, because that date was not clear from the record, and asking about the impact of these court rules on the appeal. Counsel for the Harmers states that the assignment was made on November 16, 2001 and attached a communication from ARC bearing that date which shows Judge Kakita was assigned to this matter. Reynaud's counsel gave the date of assignment as November 2002, which we construe as a typographical error since Judge Kakita presided over the arbitration in April of that year. The arbitration hearing set for

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[4] See current California Rules of Court, rule 1608(c), effective January 1, 2004. (23 pt. 2 West's Ann. Codes, Rules (2004 supp.) foll. rule 1608, p. 390.)

April 29, 2002 was well beyond the 90-day deadline to complete the arbitration after Judge Kakita's appointment. Thus, by the time Reynaud's medical condition became an issue, only the trial court, not the arbitrator, had power to grant a further continuance of the arbitration hearing.

In her response to our inquiry about the impact of the Rules of Court on the power of the arbitrator to grant the continuance, Reynaud's counsel argues that the arbitrator was authorized to grant the continuance, but he provides no direct authority to support that assertion. He cites a conflict in authority as to whether a delay in a judicial arbitration is grounds for disqualification of the arbitrator, and therefore is a basis to vacate a judgment entered on an arbitration award (see *Cabrera v. Plager*, *supra*, 195 Cal.App.3d 606; *Lilly v. Lilly* (1982) 129 Cal.App.3d 925). That authority is not on point because the cases concern disqualification of an arbitrator as a basis for vacating a judgment on an arbitration award.

Reynaud's counsel notes that neither side objected to scheduling the hearing on April 29 and that the arbitration administrator for the Los Angeles Superior Court did not certify the case to the trial court when the arbitration was not completed within the 90-day period. He concludes that this was not a judicial arbitration conducted "in the usual sense." In light of the parties' stipulation to waive the right to trial de novo, he contends the case was akin to contractual arbitration, unconstrained by the deadlines set out in the Rules of Court.

Reynaud also takes the position that she learned her request for a continuance had been denied by the arbitrator too late to provide the necessary notice to bring an ex parte request for a continuance in the superior court before the arbitration was held on Monday, April 29.[5] In his response, counsel for the Harmers argues that there was sufficient time to seek the continuance from the trial court, and therefore the continuance issue was forfeited.

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[5] In his response to our letter, counsel for Reynaud also sought leave to address matters not fully addressed in the briefs on appeal. We deny that request.

Under the applicable Rules of Court, the arbitrator did not have the authority to grant Reynaud's eleventh-hour request for a continuance. Reynaud never sought a continuance from the trial court, which had sole authority to consider the request. While it might not have been possible for Reynaud to obtain an ex parte hearing on the continuance on Friday, April 26, she could have scheduled the hearing on the morning of April 29. If the trial court had granted the continuance at that point, it would have stopped the five-hour arbitration hearing then in progress. For these reasons, the arbitrator's denial of the continuance is not a basis for reversal of the award.

Even if we were to assume that the arbitrator was authorized to consider the request for a further continuance, we would find no abuse of discretion in his declining it. Mr. Towne did not explain why *he* did not appear at the arbitration on April 29 even if his client could not be present. In her opening brief, Reynaud states that the arbitrator would have allowed her counsel, and if she was able, Reynaud, to participate in the arbitration by telephone. In support of this statement, Reynaud cites to a portion of her appendix containing a declaration executed by Mr. Towne on April 30, 2002 (Tab 4). He stated: "I had been previously advised in a telephone message from Steven David, the director of ARC, that I could participate in the commencement of any proceedings on April 29, 2002 by telephone. However, despite my request, I did not receive any telephone or written notice of what, if anything, transpired at ARC on April 29, 2002."

This declaration establishes that the arbitrator offered to allow Reynaud and her counsel to participate in the arbitration by telephone. This is a reasonable accommodation under the circumstances. But the same declaration establishes that she did not avail herself of that offer since her counsel complains that he did not receive notice of what had transpired on April 29. We have found no declaration in the record to the effect that counsel for Reynaud attempted to participate in the arbitration by telephone and was refused.

Reynaud also cites to the reporter's transcript of the July 2, 2002 hearing on the motions to confirm or vacate the award. Although she fails to cite to a particular portion of that transcript, we have reviewed the entire transcript. Counsel for Reynaud did not

explain why he did not appear in person or by telephone on April 29. At one point, he argued: "Your understanding of the governing law with respect to arbitrations, and the powers and authority that the judicial officer in that context has, is if the counsel is told by the administrator that it is okay to appear by telephone, that the arbitrator can then say, 'Well, at some unspecified time that counsel who was told he could appear by telephone does not appear in person, then anything goes. Anything can happen. We can dismiss the answer. We can dismiss the cross-complaint with prejudice. . . ." Counsel for Reynaud argued that he was misled into believing that he could participate by telephone. But this argument does not establish that he attempted to participate by telephone and was not allowed to do so. Counsel for Reynaud argued to the trial court that he repeatedly faxed inquiries to ARC on April 29th inquiring about what was occurring. Again, this does not establish an unsuccessful attempt to participate by telephone. Counsel for Reynaud argued that he would have arranged for alternative testimony by his client in the form of a video or declarations "if I had gotten some communication from the tribunal."

The argument on the motions to confirm or vacate the award sheds some light on the position taken by Reynaud's counsel. He argued that he had informed the arbitrator that he was not personally present because of his client's medical condition. He continued: "The arbitrator is in charge of the proceedings. The arbitrator has an obligation, it seems to me, to do something when he is notified before, and in the process of the proceedings, to say, 'Well, Mr. Towne, if your client can't be here today, when can she be here?" Or, 'If she can't be here today, or for several weeks, what we are going to do is to allow you to present testimony by way of declaration.' That wasn't permitted."

The burden was on counsel for Reynaud, rather than the arbitrator, to suggest alternative methods of presenting his client's case in light of her medical condition. The April 24, 2002 letter to the arbitrator and the Harmers' counsel flatly requested a continuance "for at least several weeks." He did not suggest any alternative. On learning that the arbitration would go forward, counsel for Reynaud acknowledged the possibility

that a default would be entered if no appearance was made at the arbitration, but again offered no alternatives.

On this record, we find no abuse of the arbitrator's discretion in denying the request for a continuance. *Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, cited by the Harmers, is not on point. In that case, involving contractual rather than judicial arbitration, the defense sought a continuance of the arbitration hearing when the plaintiff's treating physicians could not appear pursuant to a late-served subpoena because they had prepaid vacations scheduled. The arbitrator demanded that he be paid his full fee, or in the alternative, that the arbitration be held as scheduled. Counsel for the defense appeared at the hearing and stated that she could not go forward without the doctors as witnesses. She then left and the hearing proceeded as a default. The trial court denied a motion to vacate an arbitration award in favor of the plaintiff. On appeal, the defense argued that the denial of the continuance demonstrated bias by the arbitrator, which constituted a ground to vacate the award. The court of appeal affirmed the award, finding no good cause for the continuance. (*Id.* at p. 722.) This is not an argument made by Reynaud on appeal. Moreover, *Roitz* involved Code of Civil Procedure section 1282 on the disqualification of an arbitrator in a contractual arbitration proceeding, which is not applicable here. Finally, the request for continuance in *Roitz* was not based on the medical condition of one of the parties, but on the unavailability of witnesses who were not subpoenaed until it was too late in light of their vacation schedules.

At oral argument, new counsel for Reynaud argued that we should conclude that Judge Kakita did not personally deny the request for a continuance because good cause was shown and it is inconceivable that he would not have granted such a meritorious request. This argument was not raised in Reynaud's opening brief, and may not be raised for the first time at oral argument. It is, in any event, speculative and not supported by the record.

Our conclusion that the arbitrator properly denied the request for a continuance resolves Reynaud's related claim that the award violates fundamental public policy to

protect the rights of the disabled as codified in the Americans With Disabilities Act (42 U.S.C. § 12101).

II

Reynaud argues the trial court had no power to strike her answer and dismiss her cross-complaint. In support of this argument, she cites portions of California Rules of Court, rules 1610 and 1614.[6] An examination of the full text of the pertinent part of former rule 1610 undermines her argument.

Former rule 1610(b) provided: "The arbitration may proceed in the absence of any party who, after due notice, fails to be present and to obtain a continuance. An award shall not be based solely upon the absence of a party. In the event of a default by defendant, the arbitrator shall require the plaintiff to submit such evidence as may be appropriate for the making of an award." (The 2004 amendment changed the word "shall" to "must"; 23 pt. 2 West's Ann. Codes, Rules (2004 supp.) rule 1611, p. 392.)

This rule contemplates a default prove up of the sort that occurred here. The plain language of the rule provides that a plaintiff must prove his or her case to support an award of damages in the event of a default by the defendant. The arbitrator complied with this rule.

Reynaud cites *Lyons v. Wickhorst* (1986) 42 Cal.3d 911. In that case, the appellant refused to participate, and presented no evidence at either of two arbitration hearings. Although no evidence was presented at the hearings, the arbitrator entered an award in favor of the respondents. The trial court granted respondents' objection to a de novo trial and dismissed the action on the ground that appellant's refusal to offer evidence at the arbitration hearings bordered on contempt. The Supreme Court concluded that the sanction for refusal to participate in the arbitration proceeding was excessive. Appellant in *Lyons* had preserved his right to trial de novo. Here, the parties waived their right to trial de novo. By declining to participate in the arbitration hearing,

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[6] Effective January 1, 2004, California Rules of Court, rule 1610 was renumbered as rule 1611, without substantive change.

Reynaud chose not to present any evidence in defense of the Harmers' complaint or in support of her cross-complaint. Because she waived trial de novo, there was no possibility of providing such proof at a future trial. In these circumstances, the arbitrator did not err in treating the hearing as a default prove up. Upon proof by the Harmers of liability and damages, the arbitrator properly entered an award in their favor.

This also disposes of Reynaud's related argument that the award should be reversed because the arbitrator did not address all the issues in dispute between the parties. She claims that the arbitrator failed to decide issues involved in her consolidated mechanics lien action. As we have seen, Reynaud presented no evidence relating to these claims at the hearing. The arbitrator could only decide the issues presented to him.

III

Reynaud also argues the award must be reversed because it was based on previously undisclosed claims and evidence presented by the Harmers. She contends this constitutes extrinsic fraud.

Code of Civil Procedure section 1141.22 gives the Judicial Council authority to adopt rules specifying the grounds upon which an arbitrator or trial court may vacate an award in a judicial arbitration. California Rules of Court, rule 1615(d) provides that an award may be vacated on the grounds set out in Code of Civil Procedure section 1286.2, subdivision (a)(1) which includes an award procured by corruption, fraud, or other undue means.

Reynaud does not demonstrate how the allegedly new claims and evidence contributed to the award against her. She does not specify what claims were new or what evidence had not been disclosed in the discovery conducted prior to the arbitration hearing. A general claim of fraud based on the presentation of new claims and evidence does not suffice. Reynaud fails to establish a basis for reversal on this ground.

IV

Finally, Reynaud argues the trial court exceeded its jurisdiction by amending the judgment, nunc pro tunc, after she filed her notice of appeal. We agree.

The amendment of the judgment nunc pro tunc was the result of confusion regarding the entry of judgment on the arbitration award. Code of Civil Procedure section 1141.23 provides that "[i]f there is no request for a de novo trial and the award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and it may not be attacked or set aside except as provided by Section 473, 1286.2, or Judicial Council rule." The 2002 version of California Rules of Court, rule 1615(c) provided that the clerk of the court "shall" enter the award as a judgment upon the expiration of 30 days after the award is filed if no party has filed a request for a trial de novo. Former Rule 1615(d) gave a party against whom a judgment is entered six months to move to vacate the award.

Thus, where the parties have waived the right to trial de novo, as they did in this case, the procedure would have been for the clerk of the court to enter the judgment 30 days after the arbitrator's award is filed with the clerk. Here, that occurred on May 16, 2002 when the Harmers attempted to file the award with the trial court. The superior court marked it "received on that date" rather than entering judgment according to Code of Civil Procedure section 1141.23 and California Rules of Court, rule 1615(c). The Harmers then moved to confirm the judgment and the trial court granted that motion on July 2, 2002. But even then, no judgment was submitted by counsel for the Harmers and no judgment was entered by the trial court. Judgment was not entered until November 13, 2002.

In their motion to amend the judgment, the Harmers argued that the judgment should have been entered by operation of law on June 16, 2002 and that the delay in entry substantially prejudiced them because they lost priority in recordation of their abstract of judgment for purposes of collection.

Over objection by Reynaud, on December 13, 2002, the trial court granted the motion, nunc pro tunc, concluding that its order of July 2, 2002 had the effect of a

judgment and was corrected to read: "Order and Judgment."[7] We are not provided with a signed nunc pro tunc judgment reflecting the court's action in December 2002. There are a number of problems with that purported order, but we need discuss only one.

As Reynaud points out, under Code of Civil Procedure section 916, once her notice of appeal was filed on November 15, 2002, the trial court had no jurisdiction to amend the judgment. There is no statement or suggestion that the order of July 2, 2002, was anything other than what it purported to be -- an order, not a judgment. "As a general rule, 'the perfecting of an appeal stays [the] proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order . . . .' (§ 916, subd. (a).) The trial court's power to enforce, vacate or modify an appealed judgment or order is suspended while the appeal is pending. [Citations.] Further trial court proceedings in contravention of the section 916 stay are in excess of the court's jurisdiction, . . ." (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)

The trial court was without jurisdiction to amend the July 2, 2002 order to make it a judgment. The court's purported nunc pro tunc order of December 13, 2002 was not a proper exercise of the court's power to correct an order nunc pro tunc. The nunc pro tunc of the December 13 minute order, by minute order on December 16, 2002 did not resolve the deficiencies. The only judgment in this case was entered on November 13, 2002. We do not deem the *order* of July 2, 2002 a judgment.

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[7] Three days later, the court corrected the December 13, 2002 nunc pro tunc order nunc pro tunc.

DISPOSITION

The order of the trial court amending the order of July 2, 2002 nunc pro tunc is reversed. The judgment entered on November 13, 2002 is affirmed. Each side is to bear its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.